Koperasi Pekerja-Pekerja Kerajaan Sabah Bhd v Roslan bin Yahya & Ors

HIGH COURT (KOTA KINABALU) — CIVIL SUIT NO BKI-22NCC-3/4 OF 2021
LIM HOCK LENG J
3 OCTOBER 2024

Contract — Frustration — Illegality or impossibility — Claim for refund of monies paid — Defendants terminated conditional sale and purchase agreement due to plaintiff's failure to make payment — Plaintiff argued that agreement had already been discharged by frustration — Plaintiff claimed for refund of monies already paid to defendants — Whether agreement was frustrated or illegal — Whether plaintiff was entitled to refund in full or in part — Whether plaintiff pleaded for refund — Contracts Act 1950 ss 57 & 66 — Co-operative Societies Act 1993 s 54A(1) & (2) — Co-operative Societies (Investment) Regulations 2010 regs 4 & 7

The plaintiff was a co-operative society registered under the Co-operative Societies Act 1993 ('Act 502'). The plaintiff had entered into a conditional sale and purchase agreement ('the CSPA') with the defendants for the purchase of four parcels of land (Lots 1, 2, 3 and 4) held under native titles belonging to the defendants. The purchase price was RM17.5m. The plaintiff had paid the sum of RM6,495,288.26 ('the said sum') but after the plaintiff's board was dissolved by Suruhanjaya Koperasi Malaysia ('SKM') due to the plaintiff's failure to obtain SKM's approval for the purchase of the land ('the approval'), the plaintiff had stopped making any payment to the defendants which led to the termination of the CSPA by the defendants. The defendants also invoked cl 14 of the CSPA which provided that if there was a default in payment, all monies paid to the defendants shall be forfeited absolutely by the defendants as agreed liquidated damages and the plaintiff shall retain Lots 3 and/or 4 which shall be commensurate with the monies paid to the defendants. The plaintiff however argued that the CSPA had already been discharged by frustration pursuant to s 57 of the Contracts Act 1950 because the SKM had stepped in and replaced the plaintiff's board with an administrator and the accounts were frozen. Further, the plaintiff relied on s 54A(1) of Act 502 and argued that the CSPA was frustrated or illegal because regs 4 and 7 of the Co-operative Societies (Investment) Regulations 2010 ('the Regulations') required an application for approval and the immovable property is free from encumbrances, and these requirements were not complied with ('the plaintiff's argument'). The plaintiff in the present case sought for the refund of the said sum. In this regard, the defendants contended that the plaintiff's pleaded case was based only on cll 12 ('No Fault Termination' clause) and 13(i) ('Effect of

Termination' clause) of the CSPA, and the plaintiff was not entitled to a refund at all. The issues to be determined in the present case were: (a) whether the CSPA was frustrated or illegal; and (b) whether the plaintiff was entitled to a refund in full or in part.

Held:

(1) The defendants were rightly of the view that the approval was not required, although that was described by learned counsel for the plaintiff as tantamount to 'a deliberate decision to sidestep legal obligations for expedience'. The description would seem inappropriate since the plaintiff did not demur and both sides executed the CSPA. There was no issue of any vitiating factor such as duress or fraudulent misrepresentation which led the plaintiff to execute the CSPA. Both sides were legally represented throughout the negotiations (see paras 26–28).

(2) The plaintiff's argument was misconceived. Section 54A(2) of Act 502 stated that 'Subsection (1) does not apply to a co-operative society where- ... (b) its business involves the acquisition, investment in or sale of immovable property; ...'. Indeed, PW2 testified that the plaintiff was involved in 'Sewaan hartanah, insuran dan pawn shop, Islamic Pawn Shop dan juga Pembangunan hartanah'. Equally significant, the plaintiff's by-law 9(1)(e) stipulated that the plaintiff can 'membeli, menjual, memindahkan hak milik, mendirikan, menyewa, mencagar, memajak, menggadai an memiliki harta alih dan harta tak alih'. As such, the general prohibition of s 54A(1) prohibiting a co-operative society from acquiring, holding or investing in immovable properties did not apply to the plaintiff. There was thus no need to apply for and obtain approval from the SKM under the reg 4 of the Regulations (see paras 32–37).

(3) As for reg 7 of the Regulations, a co-operative society may invest in immovable property if 'such immovable property is free from encumbrances'. There was no difficulty with that as part of the purchase price under the conditional agreement was to go towards clearing the encumbrances. Any possibility of the plaintiff acquiring land which remained charged after full payment would not arise. That was the mischief that the regulation sought to prevent (see para 37).

(4) In the present case, the plaintiff's payment obligation was not rendered impossible or unlawful. The plaintiff was not deregistered or wound-up. Additionally, the plaintiff was not called upon to perform an obligation radically different from its obligation to pay. The plaintiff was an entity on its own. Its existence and identity were separate from its board or the administrator. Its board would have residual powers to sue the SKM to challenge or set aside its dissolution, and to proceed with what was a lawful acquisition of the land. Further, the administrator did not make

payment out of the plaintiff's accounts which were active. There was therefore no frustration (or illegality which was subsequently discovered under s 66 of the Contracts Act 1950) as claimed by the plaintiff, so as to entitle it to a refund of the total sum (see paras 39–43).

(5) The court found that cl 12 of the CSPA was not applicable. It was only applicable when there was no fault on the part of all the parties and when they agreed the CSPA could not be completed. Here the plaintiff was at fault because it did not make payment in accordance with the terms. PW2 agreed that there was no mutual agreement to have the CSPA terminated. Clause 13(i) was however not dependent on cl 12 for it to be triggered. Suffice for the plaintiff to have pleaded vide para 14 of its statement of claim: 'Clause 13(i) of the said agreement states that the vendors shall refund any money paid by the Purchaser hereunder within fourteen (14) days after the termination takes place'. Further, the court found that the plaintiff had referred to, inter alia, cl 14 of the CSPA in its statement of claim. While the defendants argued that the cause of action was not precisely predicated on cl 14, they were not led astray and could not be said to have been taken by surprise because they pleaded and relied on cl 14 to justify the forfeiture all the monies paid (see paras 48–49, 50 & 55).

(6) The defendants could not exercise the right of forfeiture under cl 14 of the CSPA since ownership of Lots 3 and/or 4 had not been transferred to the plaintiff. On that note, the parties were free to contract on the terms as they wished, and they were bound by the sanctity of what they had agreed upon, including the allocation of risk as captured in cl 14. On a true construction of cl 14, all monies paid — regardless of whether they were described as deposits or part payments — were to be refunded to the plaintiff since Lots 3 and 4 were not transferred to the plaintiff. Any forfeiture by the defendants was tied to the transfer of those Lots. There was no issue of the plaintiff benefitting from its default, for the parties had by their own volition agreed how to regulate their position in the event of the plaintiff's default (see paras 61 & 68–69).

(7) There was no plea of set-off, and there was no counterclaim for any losses that may have accrued by reason of the forced sale of the land. The issue was only raised by the defendants in further submissions following a clarification hearing. The court could only determine issues that were pleaded, and the defendants have only themselves to blame for any prejudice or injustice perceived by them. Whatever may have been let in as evidence on the forced sale of the four lots of land could not support a case of set-off or counterclaim belatedly in submissions, as it would represent a radical departure from the pleadings. Such evidence ought not to be taken into consideration (see paras 56, 73 & 76–77).

(8) In conclusion, although the plaintiff's contention of frustration must fail, it was entitled to a refund of the monies paid amounting to RM6,495,288.26 pursuant to cl 14 of the CSPA. This was because, on the evidence, Lots 3 and Lots 4 were not transferred to the plaintiff. The defendants' belated argument that Lots 3 and 4 were sold by the charges because of the plaintiff's default could not be entertained as it was never their pleaded case. Alternatively, the plaintiff was entitled to a refund under cl 13 of the CSPA. As such, the court ordered that the plaintiff was to be refunded the sum of RM6,495,288.26 with interest thereon at the rate of 5%pa, from the date of judgment till the date of full payment, as prayed. The defendants were to pay the plaintiff costs of RM20,000 subject to payment of the allocatur fee (see paras 82–86).

[Bahasa Malaysia summary

Plaintif adalah sebuah koperasi yang didaftarkan di bawah Akta Koperasi 1993 ('Akta 502'). Plaintif telah memeterai perjanjian jual beli bersyarat ('CSPA') dengan defendan-defendan untuk pembelian empat bidang tanah (Lot 1, 2, 3 dan 4) yang dipegang di bawah hakmilik adat kepunyaan defendan-defendan. Harga belian ialah RM17.5 juta. Plaintif telah membayar sejumlah RM6,495,288.26 ('jumlah tersebut') tetapi selepas lembaga plaintif dibubarkan oleh Suruhanjaya Koperasi Malaysia ('SKM') disebabkan oleh kegagalan plaintif mendapatkan kelulusan SKM untuk pembelian tanah tersebut ('kelulusan tersebut'), plaintif telah berhenti membuat apa-apa pembayaran kepada defendan-defendan yang mana ini telah membawa kepada penamatan CSPA tersebut oleh defendan-defendan. Defendan-defendan juga menggunakan kl 14 CSPA tersebut yang memperuntukkan bahawa jika berlaku keingkaran dalam pembayaran, semua wang yang dibayar kepada defendan-defendan akan dilucuthakkan secara mutlak oleh defendan-defendan sebagai ganti rugi tertentu yang dipersetujui dan plaintif hendaklah mengekalkan Lot 3 dan/atau 4 yang hendaklah berpadanan dengan jumlah wang yang dibayar kepada defendan-defendan. Plaintif bagaimanapun berhujah bahawa CSPA tersebut telah pun dibubarkan oleh kekecewaan menurut s 57 Akta Kontrak 1950 kerana SKM telah campur tangan dan menggantikan lembaga plaintif dengan pentadbir dan akaun telah dibekukan. Selanjutnya, plaintif bergantung pada s 54A(1) Akta 502 dan berhujah bahawa CSPA tersebut telah dikecewakan atau menyalahi undang-undang kerana peraturan 4 dan 7 Peraturan-Peraturan Koperasi (Pelaburan) 2010 ('Peraturan tersebut') menghendaki permohonan untuk kelulusan dan harta tak alih tersebut bebas daripada bebanan, dan keperluan-keperluan ini tidak dipatuhi ('hujah plaintif'). Plaintif dalam kes ini memohon bayaran balik/pemulangan wang tersebut. Dalam hal ini, defendan-defendan berhujah bahawa kes yang diplidkan oleh plaintif hanya berdasarkan kl 12 (klausa 'No Fault Termination') dan kl 13(i) (klausa 'Effect of Termination') CSPA, dan plaintif tidak berhak untuk bayaran balik sama sekali. Isu-isu yang perlu ditentukan dalam kes ini ialah: (a) sama ada CSPA tersebut telah dikecewakan atau

menyalahi undang-undang; dan (b) sama ada plaintif berhak mendapat bayaran balik sepenuhnya atau sebahagiannya. A

Diputuskan:

(1) Defendan-defendan adalah betul dalam berpandangan bahawa kelulusan tersebut tidak diperlukan, walaupun pandangan tersebut dikatakan oleh peguam terpelajar untuk plaintif sebagai 'a deliberate decision to sidestep legal obligations for expedience'. Pengataan tersebut kelihatannya tidak patut kerana plaintif tidak menolak dan kedua-dua pihak memeterai CSPA tersebut. Tiada isu mengenai apa-apa faktor yang merugikan seperti dures atau salah nyata fraud yang menyebabkan plaintif memeterai CSPA tersebut. Kedua-dua pihak diwakili secara sah sepanjang rundingan (lihat perenggan 26–28). B C

(2) Hujah plaintif tersebut adalah suatu salah anggap. Seksyen 54A(2) Akta 502 menyatakan bahawa 'Subseksyen (1) tidak terpakai bagi sesuatu koperasi jika-... (b) perniagaannya melibatkan pemerolehan, pelaburan dalam atau penjualan harta tak alih; ...'. Sememangnya, PW2 telah menyatakan bahawa plaintif terlibat dalam 'Sewaan hartanah, insuran dan pajak gadai, Islamic Pawn Shop dan juga Pembangunan hartanah'. Sama penting juga, undang-undang kecil 9(1)(e) plaintif memperuntukkan bahawa plaintif boleh 'membeli, menjual, memindahkan hak milik, mendirikan, menyewa, mencagar, memajak, menggadai dan mempunyai harta alih dan harta tak alih'. Oleh yang demikian, larangan am s 54A(1) yang melarang koperasi daripada memperoleh, memegang atau melabur dalam harta tak alih tidak terpakai kepada plaintif. Oleh itu, tiada keperluan untuk memohon dan mendapatkan kelulusan daripada SKM di bawah peraturan 4 Peraturan tersebut (lihat perenggan 32-37). D E F

(3) Bagi peraturan 7 Peraturan tersebut, koperasi boleh melabur dalam harta tak alih jika 'harta tak alih itu bebas dari bebanan'. Tidak ada kesukaran bagi perkara tersebut kerana sebahagian daripada harga pembelian di bawah perjanjian bersyarat tersebut adalah untuk menjelaskan bebanan. Apa-apa kemungkinan plaintif memperoleh tanah yang kekal dicagarkan selepas pembayaran penuh tidak akan timbul. Itulah kemungkaran yang ingin dicegah oleh peraturan tersebut (lihat perenggan 37). G H

(4) Dalam kes semasa, tanggungjawab pembayaran plaintif tidak menjadi mustahil atau menyalahi undang-undang. Plaintif tidak dibatalkan pendaftaran atau digulung. Selain itu, plaintif tidak dipanggil untuk melaksanakan tanggungjawab yang berbeza secara radikal daripada kewajipannya untuk membayar. Plaintif itu sendiri merupakan sebuah entiti. Kewujudan dan identitinya adalah berasingan daripada lembaga atau pentadbirnya. Lembaganya akan mempunyai kuasa residual untuk menyaman SKM untuk mencabar atau mengenepikan pembubarannya, I

dan meneruskan dengan apa yang merupakan pengambilan tanah yang sah. Selanjutnya, pentadbir tersebut tidak membuat pembayaran daripada akaun plaintif yang aktif. Oleh itu, tiada kekecewaan (atau kepenyalahan undang-undang yang kemudiannya ditemui di bawah s 66 Akta Kontrak 1950) seperti yang dituntut oleh plaintif, sehingga melayakkannya mendapat bayaran balik jumlah keseluruhan tersebut (lihat perenggan 39–43).

(5) Mahkamah mendapati kl 12 CSPA tidak terpakai. Ia hanya terpakai apabila tiada kesalahan dilakukan oleh semua pihak dan apabila mereka bersetuju bahawa CSPA tersebut tidak dapat dimuktamadkan. Di sini plaintif bersalah kerana tidak membuat pembayaran mengikut terma. PW2 bersetuju bahawa tiada persetujuan bersama untuk menamatkan CSPA tersebut. Klausa 13(i) bagaimanapun tidak bergantung pada klausa 12 untuk dicetuskan. Memadai untuk plaintif memplid melalui perenggan 14 pernyataan tuntutannya bahawa: 'Clause 13(i) of the said agreement states that the vendors shall refund any money paid by the Purchaser hereunder within fourteen (14) days after the termination takes place'. Selanjutnya, mahkamah mendapati bahawa plaintif telah merujuk, antara lain, kl 14 CSPA tersebut dalam pernyataan tuntutannya. Walaupun defendan-defendan berhujah bahawa kausa tindakan adalah tidak secara tepatnya berdasarkan kl 14, mereka tidak dipesongkan dan tidak boleh dikatakan terkejut kerana mereka memplid dan bergantung pada kl 14 untuk menjustifikasikan pelucuthakan semua wang yang dibayar (lihat perenggan 48–49, 50 & 55).

(6) Defendan-defendan tidak boleh menggunakan hak rampasan di bawah kl 14 CSPA tersebut memandangkan pemilikan Lot 3 dan/atau 4 belum dipindahkan kepada plaintif. Atas dasar tersebut, pihak-pihak bebas untuk membuat kontrak mengikut terma yang mereka kehendaki, dan mereka terikat dengan kesucian apa yang telah mereka persetujui, termasuk risiko yang ditetapkan seperti yang diperuntukkan dalam kl 14. Pada tafsiran sebenar kl 14, semua wang yang dibayar – tidak kira sama ada ia disifatkan sebagai deposit atau sebahagian bayaran – perlu dikembalikan kepada plaintif memandangkan Lot 3 dan 4 tidak dipindahkan kepada plaintif. Apa-apa pelucuthakan oleh defendan-defendan adalah terikat dengan pemindahan Lot-Lot tersebut. Tidak timbul isu tentang plaintif mendapat manfaat daripada keingkarannya, kerana pihak-pihak telah dengan kehendak mereka sendiri bersetuju bagaimana untuk mengawal kedudukan mereka sekiranya plaintif ingkar (lihat perenggan 61 & 68–69).

(7) Tiada rayuan tolakan, dan tiada tuntutan balas untuk apa-apa kerugian yang mungkin terakru disebabkan penjualan paksa tanah tersebut. Isu tersebut hanya dibangkitkan oleh defendan-defendan dalam hujahan lanjut selepas pendengaran penjelasan. Mahkamah hanya boleh

menentukan isu-isu yang telah diplid, dan defendan-defendan hanya mempunyai diri mereka sendiri untuk dipersalahkan bagi apa-apa prejudis atau ketidakadilan yang mereka hadapi. Walau apa pun yang mungkin telah dikemukakan sebagai keterangan mengenai penjualan paksa empat lot tanah tersebut tidak dapat menyokong kes tolakan atau tuntutan balas yang dibuat secara lewat dalam penghujahan, kerana ia akan menunjukkan penyimpangan radikal daripada pliding. Keterangan sedemikian tidak boleh diambil kira (lihat perenggan 56, 73 & 76–77).

(8) Kesimpulannya, walaupun hujahan plaintif tentang kekecewaan mesti gagal, ia berhak mendapat bayaran balik wang yang telah dibayar berjumlah RM6,495,288.26 menurut kl 14 CSPA. Ini kerana, berdasarkan keterangan, Lot 3 dan Lot 4 tidak dipindahkan kepada plaintif. Hujahan lewat defendan-defendan bahawa Lot 3 dan 4 telah dijual melalui cagaran disebabkan oleh keingkaran plaintif tidak boleh dilayan kerana hujahan tersebut tidak pernah menjadi kes yang diplidkan oleh mereka. Sebagai alternatif, plaintif berhak mendapat bayaran balik di bawah kl 13 CSPA. Oleh yang demikian, mahkamah memerintahkan bahawa plaintif perlu membayar balik sejumlah RM6,495,288.26 dengan faedah pada kadar 5% setahun, dari tarikh penghakiman sehingga tarikh pembayaran penuh, seperti yang dipohon. Defendan-defendan perlu membayar kos plaintif sebanyak RM20,000 tertakluk kepada pembayaran fi alokatur (lihat perenggan 82–86).]

Cases referred to

CH Choo & Sons Sdn Bhd v Wong Nyuk Shing @ Wong Teck Tsin [2010] 9 MLJ 176, HC (refd)

Cubic Electronics Sdn Bhd (in liquidation) v Mars Telecommunications Sdn Bhd [2019] 6 MLJ 15, FC (refd)

Dato' Hamzah bin Abdul Majid v Omega Securities Sdn Bhd [2015] 6 MLJ 725; [2015] 9 CLJ 677, FC (refd)

Felcra Bhd v Adli Sharidan Sahar & Ors [2024] MLJU 1851; [2024] CLJU 1663, HC (refd)

Guan Aik Moh (KL) Sdn Bhd & Anor v Selangor Properties Bhd [2007] 4 MLJ 201; [2007] 3 CLJ 695, CA (refd)

MLGH (Sabah) Sdn Bhd v Rainbow Bay Sdn Bhd and another appeal [2023] 5 MLJ 597, CA (refd)

RHB Bank Bhd (substituting Kwong Yik Bank Bhd) v Kwan Chew Holdings Sdn Bhd [2010] 2 MLJ 188; [2010] 1 CLJ 665, FC (refd)

Tan Chong Industrial Equipment Sdn Bhd v Transnasional Express Sdn Bhd & Ors [2024] CLJU 1977, CA (refd)

Legislation referred to

Co-operative Societies (Investment) Regulations 2010 regs 4, 7

Co-operative Societies Act 1993 ss 54A, 54A(1), (2), 69(1)(iv)(C)

A Contracts Act 1950 s 66, s 57(2)
Land Ordinance (Cap 68)

Jeyan Marimuttu (with Azhier Farhan) (Azhier Arisin & Jaafar) for the plaintiff.
Lawrence Thien (with Valerie Lim) (Chau & Thien) for the first, second and third
B *defendants.*

Lim Hock Leng J:

AGREED BACKGROUND FACTS

C

[1] The plaintiff is a co-operative society in Sabah. It is registered under the Co-operative Societies Act 1993.

[2] The first and second defendants were the registered owners of four
D parcels of land held under native titles, namely, NT 213011815 (Lot 1), NT 213128262 (Lot 2), NT 213011806 (Lot 3), and NT 213011780 (Lot 4). The third defendant was also a registered owner of Lot 2. All four parcels of land are situate in the District of Penampang.

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[3] On 10 July 2019, the plaintiff and the three defendants entered into a conditional sale and purchase agreement ('the CSPA') over the four lots of land. The purchase price was RM17.5m.

[4] The plaintiff paid the earnest deposit and additional deposit of RM1m
F and RM1.5m to the defendants.

[5] There were encumbrances over the Land which had been charged to SMEB Asset Management Sdn Bhd and Hong Leong Bank Bhd. The plaintiff
G was required to pay RM800,000 each month to SMEB Asset Management Sdn Bhd, and also to service the loan facilities granted by Hong Leong Bank Bhd. As part payment of the purchase price, the plaintiff had paid RM3.4m and RM180,000 SMEB Asset Management Sdn Bhd, and Hong Leong Bank Bhd respectively towards clearing the encumbrances.

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[6] The plaintiff was also required to pay RM7.8m by 60 monthly instalments of RM138,429.42 each, commencing one month from the execution of the CSPA. It paid three monthly instalments amounting to RM415,288.26, that is, from August to October 2019.

I

[7] In total, the plaintiff had paid the sum of RM6,495,288.26 under the CSPA.

[8] Those are agreed facts of the case. See SAF.

MATERIAL TERMS OF THE CSPA

[9] The CSPA dated 10 July 2019 is a Part A document, agreed as to authenticity and contents.

[10] The plaintiff had intended to develop the four lots of land which will be collectively referred to as the land on which hostels and the plaintiff's business premises were to be built. The development was to be called Kopeks Village.

[11] The CSPA is expressly stated to be conditional upon:

(a) the conversion of the land from native title status to country lease status; and

(b) amendment of the conditions in the title deeds so as to enable Kopeks Village to be developed.

[12] These conditions precedent were required to be satisfied within one year from the date of the CSPA.

[13] It was agreed that if the conditions precedent could not be fulfilled within the one-year period, there would be an extension of one year upon the expiry of that period. See cl 2(d) of the CSPA:

> (d) if the Condition Precedent cannot be obtained and completed within the Condition Precedent Period for any reason whatsoever and having regard to the viable timeframe required and taken by the relevant authorities to give approvals in respect of the Conditions Precedent, the Parties agree to extend the Conditions Precedent Period to a maximum period of one (1) year from the expiry of Conditions Precedent Period.

SKM'S INVOLVEMENT, TERMINATION, AND CSPA CLAUSES

[14] On 17 October 2019, the Suruhanjaya Koperasi Malaysia ('SKM') ordered the board of the plaintiff to be dissolved with effect from the end of the month. The order was made pursuant to the Co-operative Societies Act 1993, s 69(1)(iv)(C).

[15] The SKM dissolved the board because the plaintiff did not obtain the written approval of SKM for the purchase of the land. In this connection, it relied on s 54A(1) of the Co-operative Societies Act 1993 which states that, unless otherwise provided, no co-operative society shall acquire, hold or invest in any immovable property.

[16] The SKM appointed an administrator to assume control according to the terms of reference.

[17] As noted earlier, the plaintiff had paid the monthly instalments up till October 2019. It did not pay the monthly instalments thereafter.

[18] On 7 January 2020, the first, second and third defendants — through their solicitors — wrote to the plaintiff to terminate the CSPA.

[19] They said the plaintiff had defaulted in paying the RM138,429.42 monthly instalment to them, defaulted in settling three monthly payments of RM800,000 each to SMEB Asset Management Sdn Bhd, and also defaulted in servicing the loan facilities with Hong Leong Bank Bhd.

[20] They invoked cl 14 of the CSPA which provides that if there is a default in payment, 'all monies paid to the (defendants) 'shall be forfeited absolutely by (the defendants) as agreed liquidated damages,' and the plaintiff shall retain Lots 3 and/or 4 which shall be commensurate with the monies paid to the defendants.

[21] Clause 14 further provided that in such an event, neither party would have any claim against each other and the defendants would have absolute discretion to resell Lots 1 and 2.

[22] In response, the plaintiff's solicitors sent what they described as a letter of termination dated 13 January 2020 to the defendants although in the same letter, they said the CSPA had already been discharged by frustration because of the dissolution of the board. It also said that the appointment of an administrator under terms of reference did not expressly confer powers to make payment. Prior to the order of dissolution of the board, the SKM had directed the plaintiff to stop any remittance of money to the defendants and to obtain approval from the SKM which was, in any event, subsequently refused.

WHETHER CSPA FRUSTRATED OR ILLEGAL

[23] The law on frustration is put on a statutory footing vide s 57(2) of the Contracts Act 1950 which provides:

> A contract to do an act which, after the contract is made, becomes impossible, or by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.

[24] In *Guan Aik Moh (KL) Sdn Bhd & Anor v Selangor Properties Bhd* [2007] 4 MLJ 201; [2007] 3 CLJ 695, Gopal Sri Ram JCA (as he then

was) explained the test for frustration in the following manner:

> ... there are three elements woven into the fabric of the doctrine embodied in s 57. First, the event upon which the promisor relies as having frustrated the contract must have been one for which no provision has been made in the contract. If provision has been made then the parties must be taken to have allocated the risk between them. Second, the event relied upon by the promisor must be one for which he or she is not responsible. Put shortly, self-induced frustration is ineffective. Third, the event which is said to discharge the promise must be such that renders it radically different from that which was undertaken by the contract. the court must find it practically unjust to enforce the original promise. If any of these elements are not present on the facts of a given case, then s 57 does not bite.

[25] The plaintiff's position is that the CSPA was frustrated because the SKM had stepped in and replaced the board with an administrator and the accounts were frozen. It was submitted that these events happened because the defendants had proposed that approval need not be obtained from SKM whereas the plaintiff was of the view, at the time of negotiations, that approval was needed.

[26] The defendants were rightly of the view that such approval was not required, although that was described by learned counsel for the plaintiff as tantamount to 'a deliberate decision to sidestep legal obligations for expedience'. The description would seem inappropriate since the plaintiff did not demur and both sides executed the CSPA.

[27] There is no issue of any vitiating factor such as duress or fraudulent misrepresentation which led the plaintiff to execute the CSPA.

[28] Both sides were legally represented throughout the negotiations.

[29] The plaintiff rides on s 54A(1) of the Co-operatives Act 1993 which provides: 'Unless otherwise provided in the regulations and sub-s (2), no co-operative society shall acquire, hold or invest in any immovable property'.

[30] The plaintiff submits that the CSPA was frustrated or illegal because regs 4 and 7 of the Co-operative Societies (Investment) Regulations 2010 required an application for approval and the immovable property is free from encumbrances, and these requirements were not complied with.

[31] The plaintiff cited *MLGH (Sabah) Sdn Bhd v Rainbow Bay Sdn Bhd and another appeal* [2023] 5 MLJ 597 where Lee Swee Seng JCA held:

> We agree with learned counsel for MLGH that in the light of the rejection of the DEIA final report and the enactment of s 9A of the Sabah Land Ordinance, the

JVA/SA was frustrated as it had become impossible and unlawful to be performed and thus, both the developer and MLGH are discharged from performing their respective obligations under the JVA/SA.

[32] The plaintiff's arguments are misconceived.

[33] Section 54A(2) states that:

> Subsection (1) does not apply to a co-operative society where —
>
> (a) holding of an immovable property is for the satisfaction of a debt of a member to the co-operative society;
>
> (b) *its business involves the acquisition, investment in* or sale of *immovable property*;
>
> (c) the acquiring, holding or investing of an immovable property is necessary for the purpose of conducting its business; or
>
> (d) *it provides housing or other amenities for its employees which are set out in their schemes of service.*

[34] Indeed, PW2 testified that the plaintiff was involved in 'Sewaan hartanah, insuran dan pawn shop, Islamic Pawn Shop dan juga Pembangunan hartanah'. (Emphasis added.)

[35] Equally significant, the plaintiff's by-law 9(1)(e) stipulates that the plaintiff can 'membeli, menjual, memindahkan hak milik, mendirikan, menyewa, mencagar, memajak, menggadai an memiliki harta alih dan harta tak alih'.

[36] As such, the general prohibition of s 54A(1) prohibiting a co-operative society from acquiring, holding or investing in immovable properties does not apply to the plaintiff.

[37] There is thus no need to apply for and obtain approval from the SKM under the reg 4. As for reg 7, a co-operative society may invest in immovable property if 'such immovable property is free from encumbrances'. There is no difficulty with that as part of the purchase price under the conditional agreement was to go towards clearing the encumbrances. Any possibility of the plaintiff acquiring land which remains charged after full payment would not arise. That is the mischief that the regulation sought to prevent.

[38] As for the case of *MLGH*, it did not involve s 54A of the Co-operative Societies Act 1993 but an amendment to the Sabah Land Ordinance which rendered performance of the joint venture agreement/supplementary agreement illegal or impossible. Further, in that case, the requisite approval of

the State Environmental Protection Department was not obtained.

[39] In this case, by contrast, the plaintiff's payment obligation was not rendered impossible or unlawful.

[40] Learned counsel for the defendants rightly pointed out the plaintiff was not deregistered or wound up. He also rightly pointed out that the plaintiff was not called upon to perform an obligation radically different from its obligation to pay.

[41] The plaintiff is an entity on its own. Its existence and identity is separate from its board or the administrator. Its board would have residual powers to sue the SKM to challenge or set aside its dissolution, and to proceed with what was a lawful acquisition of the land.

[42] PW1 did not make payment out of the plaintiff's accounts which were active. In his words: '... selepas saya mengambil alih sebagai pentadbir, akaun tersebut diaktifkan semula'.

[43] There was therefore no frustration (or illegality which was subsequently discovered under s 66 of the Contracts Act 1950) as claimed by the plaintiff, so as to entitle it to a refund of the total sum of.

WHETHER THE PLAINTIFF IS ENTITLED TO A REFUND IN FULL OR IN PART

[44] The defendants contended that the plaintiff's pleaded case was based only on cll 12 and 13(i) of the CSPA, and it was not entitled to a refund at all.

[45] They referred to its statement of claim, para 20: '... the performance of the said agreement is void and legally discharged by frustration pursuant to s 57(2) of the Contracts Act 1950 as the plaintiff is incapable of performance not attributed to the act of default of any party which triggered the operation of Clause 12 and 13(i) of the said agreement'.

[46] Clause 12 ('No Fault Termination') reads:

> In the event where the transaction/arrangement hereunder cannot be completed for any reason whatsoever not attributable to any act or default of any Party hereto, any Party herein shall be entitled at any time thereafter (subject that all Parties shall have mutually agreed that the transaction/arrangement hereunder cannot be so completed as aforesaid), to give notice to the other Party terminating this Agreement whereupon the whole of the provisions of Clause 13 below shall be applicable mutatis mutandis.

[47] Clause 13 (Effect of Termination) reads:

> If this Agreement is terminated by any reason whatsoever, the following shall ensue (in addition to any other remedy as specifically provided in other clauses of this Agreement, if applicable):
>
> (i) The Vendor shall refund all monies paid by the Purchaser hereunder within fourteen (14) days after the termination takes place;
>
> (ii) In exchange of the refund of all monies by the Vendor to the Purchaser under sub-clause (a)(i) above, the Purchaser shall return the original document title to the Property and transfer to the Vendor (save that, the Purchaser may retain the transfer until after the Stamp office has reverted on any application of refund of the stamp duty paid);
>
> (iii) The Purchaser shall withdraw his caveat on the said Lands at his costs, if any;
>
> (iv) The Purchaser shall re-deliver vacant possession of the said Lands without any rental or fees whatsoever to the Vendor, if already delivered;
>
> And the termination of this Agreement shall complete whereby both Parties shall not have any claim against the other save for any antecedent breach.

[48] I find that cl 12 is not applicable. It is only applicable when there is no fault on the part of all the parties and they agree the CSPA cannot be completed. Here the plaintiff was at fault because it did not make payment in accordance with the terms. PW2 agreed that there was no mutual agreement to have the CSPA terminated. See NOP, lines 564–566.

[49] Clause 13(i) is however not dependent on cl 12 for it to be triggered. Suffice for the plaintiff to have pleaded vide para 14 of its statement of claim:

> Clause 13(i) of the said agreement states that the vendors shall refund any money paid by the Purchaser hereunder within fourteen (14) days after the termination takes place.

[50] In addition, the plaintiff had referred to, inter alia, cl 14 of the CSPA in its statement of claim. While the defendants argued that the cause of action was not precisely predicated on cl 14, they were not led astray for they pleaded and relied on cl 14 to justify the forfeiture all the monies paid.

[51] The plaintiff may be said to have broadly relied on the CSPA, including cl 14, to found its claim for the refund of all monies paid. Its claim for a full refund is consistent with the tenor of the CSPA as expressed in cll 12 and 13, as may be expected of a conditional contract. There was evidence to support the claim at the trial. The plaintiff pleaded the defendants' failure to refund the monies, and also prayed for relief in the form of a refund. There was no radical departure from the pleading.

[52] Although the plaintiff's letter of termination dated 13 January 2020 referred to cl 12 of the CSPA, it had pleaded that 'the defendants have failed, refused, and/or neglected to refund the sum demanded or any part thereof,' and all the evidence relating to cll 12, 13 and 14 were adduced before the court.

[53] In consequence, the plaintiff sought against the first, second and third defendants vide prayer (b): 'The sum of RM6,495,288.26 being part payment of purchase price under the said agreement to be refunded to the plaintiff'.

[54] Now, the defendants' pleaded case was that they were entitled to forfeit all the payments made by the plaintiff. This is how they expressed their defence in para 10B of the amended defence: 'The defendants aver that the said sum of RM6,495,288.26 paid by the plaintiff should be forfeited by the defendants as agreed liquidated damages pursuant to Clause 14 of the said Conditional Sale and Purchase Agreement'.

[55] As indicated earlier, cl 14 was in issue and relied upon by the defendants who could not be said to have been taken by surprise.

[56] In any event, there was no plea of set off, and there was no counterclaim for any losses that may have accrued by reason of the forced sale of the land. The court cannot consider that which is not pleaded. In *RHB Bank Bhd (substituting Kwong Yik Bank Bhd) v Kwan Chew Holdings Sdn Bhd* [2010] 2 MLJ 188; [2010] 1 CLJ 665, James Foong FCJ held:

> [35] On this, we would like to add that it is not the duty of the court to invent or create a cause of action or a defence under the guise of doing justice for the parties lest it be accused of being biased towards one against the other. The parties should know best as to what they want and it is not for the court to pursue a cavalier approach to solving their dispute by inventing or creating cause or causes of action which were not pleaded in the first place. Such activism by the court must be discouraged otherwise the court would be accused of making laws rather than applying them to a given set of facts.

[57] Originally, the defendants had a counterclaim but it was struck out in its entirety by Justice Wong Siong Tung. There was no appeal against that decision. The defendants' subsequent application to 'amend' the wholly struck out counterclaim was disallowed, as there was no longer any extant pleading to be amended.

[58] So, the defendants' sole defence was predicated on cl 14 of the CSPA which provides:

> In the event the Purchaser fails or neglects to make payment or release of the Balance of Purchase Price to the Vendor in accordance with Clause 3 above or any other

A default, then it is hereby agreed that *all monies paid to the Vendor and/or paid on behalf of the Vendor for the benefits of the Vendor's bankers shall be forfeited absolutely by the Vendor as agreed liquidated damages and the Purchaser shall absolutely retains the ownership and possession of shares in Lot 3 and/or Lot 4 of the said lands which commensurate with the monies paid to the Vendor* ...

B

[59] The defendants argued that it is not the plaintiff's pleaded case that ownership of Lot 3 and/or Lot 4 must be vested in it, failing which all the monies paid under the CSPA must be refunded.

C **[60]** The court is not persuaded by the defendants' argument. It is the defendants who seek to invoke the benefit of cl 14. As for the plaintiff, it rightly submits that there is no evidence that the transfer of ownership of Lot 3 and /or 4 to the plaintiff has taken place.

D **[61]** I am inclined to hold that the defendants cannot exercise that right of forfeiture since ownership of Lots 3 and/or 4 has not been transferred to the plaintiff. On that note, the parties were free to contract on the terms as they wish, and they are bound by the sanctity of what they have agreed upon, including the allocation of risk as captured in cl 14.

E

[62] In *Tan Chong Industrial Equipment Sdn Bhd v Transnasional Express Sdn Bhd & Ors* [2024] CLJU 1977, the Court of Appeal cited with approval the following passages in *The Law of Restitution and Unjust Enrichment in Malaysia* by Low Weng Tchung:

F

> [2.26] Contractual agreement to prevail. While it is now beyond question that the law of restitution and unjust enrichment is separate and distinct category of the law of obligations, it must always be borne in mind that the law of restitution and unjust enrichment cannot be utilized so as to override, subvert or defeat the terms of any
>
> G contract between the parties, especially where such contract has made express provision as to the allocation of risk between the parties.
>
> [2.27] No redistribution of risk allocation by contract. Generally speaking, in the absence of any vitiating factors such as fraud, duress or misrepresentation resulting in any agreement being avoided ab initio, and where the agreement has not been
>
> H frustrated due to impossibility of performance, the agreement between the parties should not be disturbed, and the courts should not invoke the law or restitution and unjust enrichment to redistribute risks which have been allocated by the mutual agreement of the parties.

I **[63]** Absent the exchange of Lots 3 and/or 4, the total payments amounting to RM6,495,288.26 would have to be refunded to the plaintiff as a whole.

[64] As such, there is no need for the court to determine whether the initial payment of RM1m or, in addition, the second payment of RM1.5m are to be

treated as deposits which are liable to be forfeited by the plaintiff; or alternatively, whether they are to be treated as part payments which are to be wholly refunded to the defendants.

[65] In the plain language of cl 14, the court considers that all monies paid by the plaintiff are refundable if Lots 3 and 4 cannot be vested with the plaintiff.

[66] If the court is wrong in holding that the plaintiff is entitled to a full refund, it would seem that the plaintiff would at least be entitled to a refund of RM3,995,288.26 only, that is, RM6,495,288.26 — RM2.5m which the plaintiff has accepted in SAF as the earnest deposit of RM 1m and additional deposit of RM2.5m, although they have in their last submission argued the two payments totalling RM2.5m are not deposits but are part payments and fully refundable. In this alternative scenario, the plaintiff is bound by its own position in SAF. In *CH Choo & Sons Sdn Bhd v Wong Nyuk Shing @ Wong Teck Tsin* [2010] 9 MLJ 176, as VT Singham J put it: '... the plaintiffs are estopped from denying or disputing the statement of agreed facts'. Notably, the plaintiff itself pleaded in para 12 of the statement of claim that the payments of RM1m and RM1.5m are deposits.

[67] Anyway, there cannot be full forfeiture of the sum of RM6,495,288.26 which represents a hefty percentage of the purchase price of RM 17m. That would be unreasonable and penal in nature. See *Cubic Electronics Sdn Bhd (in liquidation) v Mars Telecommunications Sdn Bhd* [2019] 6 MLJ 15.

[68] In any case, as mentioned earlier, and to put its decision in brief, the court takes the view that on a true construction of cl 14, all monies paid — regardless of whether they are described as deposits or part payments — are to be refunded to the plaintiff since Lots 3 and 4 were not transferred to the plaintiff. Any forfeiture by the defendants is tied to the transfer of those lots.

[69] There is no issue of the plaintiff benefitting from its default, for the parties had by their own volition agreed how to regulate their position in the event of the plaintiff's default.

[70] The defendants may forfeit all monies paid but any forfeiture by is tied to the transfer of those lots. To be clear, there is no room for the monetary value of Lots 3 and 4 to be set off. That is not the defendants' pleaded case. In any case, the value of those lots is higher than the amount sought to be forfeited, as may be gleaned from the sum of more than RM7m said to be due to the financing institution in the CSPA.

[71] Next, in a case where the plaintiff's breach '*has caused the defendant to*

sustain losses, the defendant may recover damages as compensation'. See *The Law of Contract in Singapore* (2nd Ed) 2022, general editor: Andrew Phang Boon Leong), Vol 2, p 1965.

[72] This is what the defendants raised in further submissions (para 7e) of encl 157): '... the forced sale of the said lands was caused by the action of the plaintiff, resulting in the forced sale value of almost 50% off the market value of the said lands at the material time'.

[73] Yet, the defendants' purported losses were, as noted earlier, *not* pleaded as a set off or raised by way of counterclaim. The issue was only raised in further submissions following a clarification hearing.

[74] Had the defendants done so by in its pleading, the plaintiff may have raised issues as to whether the purchase price was bona fide given that there was some allegation that the top management of the plaintiff is related to the defendants and so on.

[75] It does not lie in the mouths of the defendants to say that the plaintiff had defaulted and should be held accountable for losses purportedly sustained by them when the issue or supporting salient facts are not pleaded.

[76] The court can only determine issues that are pleaded, and the defendants have only themselves to blame for any prejudice or injustice perceived by them.

[77] Whatever may have been let in as evidence on the forced sale of the four lots of land could not support a case of set off or counterclaim belatedly in submissions, as it would represent a radical departure from the pleadings. Such evidence ought not to be taken into consideration. In *Felcra Bhd v Adli Sharidan Sahar & Ors* [2024] MLJU 1851; [2024] CLJU 1663, Su Tiang Joo J, referring to the decision of the Federal Court in *Dato' Hamzah bin Abdul Majid v Omega Securities Sdn Bhd* [2015] 6 MLJ 725; [2015] 9 CLJ 677, observed that 'other than ex facie illegality, any radical departure from the pleaded case must be pleaded to avoid surprise at the trial'.

[78] The action herein was filed in April 2021. The defendants had ample time to have an appropriate counterclaim drafted for their purported losses if they felt that there was sufficient evidence, or to apply to re-amend their defence but they did not do so.

[79] Without such amendments, it cannot be said one way or another whether the plaintiff is liable to the defendants for the purported losses arising

from the forced sale of the land. There is no requirement for the plaintiff to adduce rebuttal evidence in the absence of a plea of set off or counterclaim.

[80] On a related note, the plaintiff sought to amend its statement of claim on 12 June 2014, one week before the trial which was fixed to start on 19 June 2024. The application was dismissed with costs, otherwise the trial would have been derailed at the eleventh hour, especially since witness statements had already been filed based on the statement of claim. The defendants rightly objected as there were new matters/causes of action raised which would change the character of the dispute between the parties, and cause prejudice to them which could not be compensated by an order of costs.

[81] Overall, it would appear that both sides took their pleadings lightly.

CONCLUSION

[82] To conclude, although the plaintiff's contention of frustration must fail, it is entitled to a refund of the monies paid amounting to RM6,495,288.26 pursuant to cl 14 of the CSPA. This is because, on the evidence, Lots 3 and Lots 4 were not transferred to the plaintiff.

[83] The defendants' belated argument that Lots 3 and 4 were sold by the charges because of the plaintiff's default cannot be entertained as it was never their pleaded case.

[84] Alternatively, the plaintiff is entitled to a refund under cl 13 of the CSPA.

[85] The plaintiff is to be refunded the sum of RM6,495,288.26 with interest thereon at the rate of 5%pa, from the date of judgment till the date of full payment, as prayed

[86] The defendants are to pay the plaintiff costs of RM20,000 subject to payment of the allocatur fee.

Order accordingly.

Reported by Dzulqarnain Ab Fatar